

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



**74-1036**

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P/S

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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CITY TRUST COMPANY, Executor  
of the Will of  
FREDERICK A. LOCKWOOD, Deceased,  
Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,  
Defendant-Appellant

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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

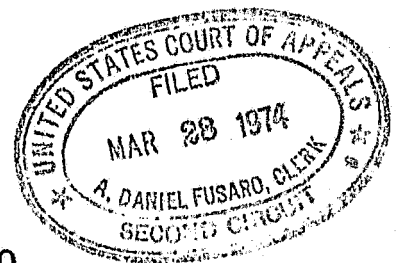
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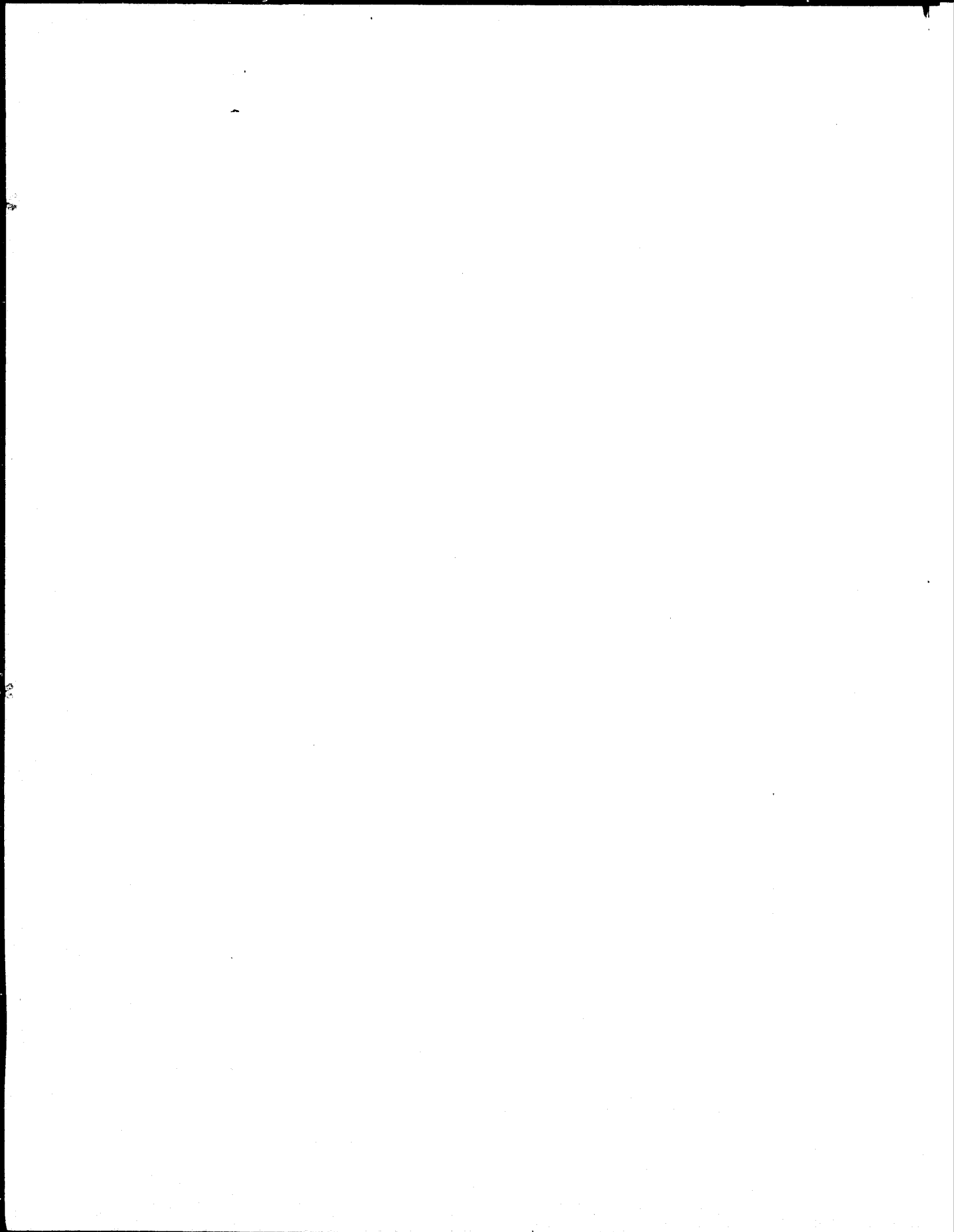
APPELLEE'S BRIEF

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LOUIS CICCARELLO  
168 East Avenue  
Norwalk, Connecticut 06854  
For Appellee

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FOR THE SECOND CIRCUIT

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No. 74-1036

CITY TRUST COMPANY, Executor  
of the Will of Frederick A.  
Lockwood, Deceased,

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE APPELLEE

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This is an action brought by the Executor of the Will of Frederick A. Lockwood, pursuant to 28 U.S.C. 1346 (a) (1), for refund of federal estate tax paid by reason of a denial of a charitable deduction claimed under 26 U.S.C. 2055 for one-half

of the remainder of a testamentary trust. After filing a Stipulation of Facts, the parties filed cross motions for summary judgment. The government appeals from the decision of the United States District Court for the District of Connecticut, John O. Newman, Judge, granting the Executor's motion and awarding it \$197,497.53, plus statutory interest.

#### STATEMENT OF THE ISSUE PRESENTED

Did the District Court properly conclude that the language of the decedent's will defines an objective standard controlling the trustee's power to invade corpus?

#### ARGUMENT

THE DISTRICT COURT'S CONCLUSION THAT THE DECEDENT'S WILL DEFINES AN OBJECTIVE STANDARD CONTROLLING THE TRUSTEE'S POWER OF INVASION IS PROPER AND CONSISTENT WITH APPLICABLE FEDERAL AND STATE LAW.

A pre-1969 testamentary gift of a charitable remainder interest is deductible under Section 2055 (a) of the Internal Revenue Code of 1954 if its value is "presently ascertainable". Treas. Reg. 20-2055 - 2 (a) (1958). In the case of a split-interest trust, a charitable remainder interest is deductible if: (1) the trustee's power to invade corpus for the benefit of

the life beneficiary is governed by an objective standard, such as the continuance of his or her accustomed standard of living, and (2) the possibility of invasion is so remote as to be negligible. Ithaca Trust Co. v. United States, 279 U.S. 151 (1929). The government and the taxpayer have stipulated that, in light of Mrs. Lockwood's advanced age, obvious wealth, and quiet manner of life, the possibility of the trustee invading corpus for her benefit was, and is, so unlikely as to be negligible. Accordingly, the sole issue presented here is whether the language of the decedent's will defines an objective standard governing the trustee's power of invasion.

The critical language of the Lockwood will is contained in Article 3, which includes the following paragraph.

"All of the rest, residue and remainder of my property, real and personal, of whatsoever the same may consist and wheresoever it may be situated, I give, devise and bequeath to my trustee hereinafter named, UPON TRUST, HOWEVER, for the following uses and purposes: to hold, manage, sell, invest and reinvest the same and to pay the net income therefrom to or for the benefit of my dear wife, ALICE DREW LOCKWOOD, during her life. My trustee may, in its absolute and unhampered discretion, pay so much of the principal of this trust as it may deem to be necessary for the proper care, comfort, welfare and happiness of my wife. It is my desire that my wife may occupy her own home and live in the manner to which she has been accustomed in our life together so long as she desires to do so,

and that she shall have from my estate at least Five Hundred Dollars (\$500.00) a month from the date of my death, with payments to begin as soon after my death as is practicable, for her own personal spending money and for whatever she may desire, after the payment of all of her necessary expenses. I direct my executor and trustee to begin to make regular monthly payments to my wife on account of the income which is due or will become due to her as soon after my death as it is practicable to do so."

The taxpayer contends that the entire residuary trust language must be read as a whole, and when so read, it adequately establishes an objective standard governing the trustee's power to invade principal, namely Mrs. Lockwood's accustomed style of life. The government, on the other hand, taking words, such as "happiness" and "for whatever she may desire," out of context, argues that no ascertainable standard exists. After reviewing the applicable federal and state law, the District Court in a well-reasoned opinion properly concluded that the testator's language limited the trustee's power of invasion to the widow's accustomed standard of living.

The meaning of this language is dependent upon its interpretation under Connecticut law, since the Connecticut courts would ultimately determine the limits upon a power to

invade corpus. Lincoln Rochester Trust Co. v. Commissioner 181 F. 2d 424, 426 (2 Cir. 1950). In the construction of a testamentary trust, the intent of the testator must control.. Connor v. Hart, 157 Conn. 265, 275, 253 A. 2d 9 (1968). This intent is to be determined from reading the instrument as a whole in light of the circumstances concerning the testator when the instrument was executed, including the condition of his estate, his relations to his family and beneficiaries and their station and conditions. Connecticut Bank & Trust Company v. Lyman, 148 Conn. 273, 279, 170 A. 2d 130 (1961).

Applying this rule, it is clear that the testator's expressed intent was to provide for the private and charitable interests named in the will. His desire to continue, after his death, his obligation of support is made manifest by his gift to his wife of the net income of the trust and by his grant to the trustee of the power to invade principal on her behalf. Because of her age, he provided for a gift-over of the net income to his sister and others, who likely would survive the wife. Finally, he provided for the disposition of the remainder, with one-half going to the named charities. His meticulous assignment of percentages to these charities evidenced the strength of his charitable

expectations.

His principal intent, undoubtedly, was to benefit, and to secure the interests of, each of the persons and charities named in his will. This desire is highlighted by the fact that he did not name his wife as trustee, but rather an independent bank. Nor did he give her the right to demand principal. Compare Henslee v. Union Planters National Bank & Trust Company, 335 U.S. 595 (1949). Had the testator wished to give his wife unlimited power over the principal to the detriment of the others, he could have easily so provided. The language he used relative to the power of invasion, however, is restrictive and protective of the interests of the other life tenants and the remaindermen.

The restriction on the trustee's power of invasion is initially evident in the basic grant of the power. This grant is to invade principal to the extent deemed "necessary for the proper care, comfort, welfare and happiness" of Mrs. Lockwood, during her lifetime. Although the use of the word "happiness" is arguably suspect, it is noteworthy that the nouns "care, comfort, welfare and happiness" are conjoined by the word "and". As a result, these nouns appear to compliment each other and blend in meaning. See United States v. Powell, 307 F. 2d 821, 828, (10. Cir. 1962), where the court found the word "happiness"

to be synonymous with "welfare" and "comfort". Moreover, they are delimited by the word "necessary", which under Connecticut law is generally restricted to maintenance of the accustomed standard of living. Hooker v. Goodwin, 91 Conn. 463, 99 A. 1059 (1917).

In Estate of Ford v. Commissioner, 53 T.C. 114 (1969) aff'd. 450 F. 2d 878 (C.A. 2, 1972) (per curiam), the trust instrument permitted the trustee to invade corpus for the benefit of the income beneficiary "for the purpose of defraying expenses occasioned by illness, infirmity or disability, either mental or physical, or for his support, maintenance, education, welfare and happiness". The government, in that case, claimed that the language, particularly the word "happiness", gave the trustee unrestricted powers over the trust property. The Tax Court, however, held that the aforementioned language read as a whole was circumscribed by the precondition that the trustee must be satisfied that the income beneficiary is "in need of funds" in cases of the available trust income before he may invade the corpus, to "relieve or contribute toward the relief of any such need". Thus, viewing the invasion provision in its entirety, the Tax Court concluded that its emphasis on "need" delimited "happiness" and provided an objective standard enforceable against

the trustee in a Court of Equity.

However, the limitation on the trustee's power of invasion in the instant case is given full expression in the sentence immediately following the basic grant:

"It is my desire that my wife may occupy her own home and live in the manner to which she has been accustomed in our life together so long as she desires to do so, and that she shall have from my estate at least Five Hundred Dollars (\$500.00) a month from the date of my death, with payments to begin as soon after my death as is practicable, for her own personal spending money and for whatever she may desire, after the payment of all of her necessary expenses."

Had the testator desired to let the subjective implications of the word "happiness" stand alone, so as to give his wife potentially unbridled power of invasion, he simply could have omitted this sentence. However, its inclusion is clearly indicative of his intent to give definitive content to the basic grant and to provide guidelines to the trustee in the exercise of its power.

Upon analysis, the sentence reveals that the testator equated his wife's "proper care, comfort, welfare and happiness" with the maintenance of her normal mode of life. He specifically mentions this standard when he states that his wife may "live in the manner to which she has been accustomed in our life together."

In addition, he provides the trustee with what he considers the component parts of her accustomed manner of living - occupying "her own home," the "payment of all of her necessary expenses", and a monthly amount of "her own personal spending money." In order to avoid interruption in his wife's accustomed manner of life after his death, because of potential administrative delays or uncertainties, he enjoins the trustee to begin payments to her as soon "as is practicable." All of the provisions within this sentence relate to the settled and obvious needs of his wife, and as stated by the District Court, "manifest decedent's intent to guarantee his wife's continued enjoyment of her habitual standard of living - and no more." (R. 25.)

The provision for the monthly amount of spending money, as correctly stated by the District Court, "appears as no more than an approximation of the disposable income needed by Mrs. Lockwood to underwrite her style of life." (R. 28.) The figure of \$500.00, in all probability, was the approximate amount of spending money utilized by Mrs. Lockwood in 1962, when the will was executed. The testator further utilized the figure in order to provide the trustee with a minimum guideline. Obviously, the amount of spending money expended by Mrs. Lockwood in the continuance of

her standard of life would fluctuate with economic conditions and her age (she was 72 at the time the will was executed). Therefore, the testator could do no more than to approximate his wife's needs and provide the trustee with what he considered to be the lowest figure necessary to meet her settled manner of living. Accordingly, the provision of "at least Five Hundred Dollars" of personal spending money is properly construed by the District Court, especially in view of the Lockwood family circumstances, as "a modest estimate of the wife's pattern of 'personal spending' than an open-ended invitation to unaccustomed extravagance." (R. 28.)

The phrase "for whatever she may desire" also is not a license, or an invitation on the part of the testator, to invade principal, but merely expresses a lack of obligation on the part of the trustee to trace the use of the spending money given to the widow. As stated by the District Court, it is only "a prudent bar to any assumption by the trustee or an otherwise possible duty or power to dictate precise choices better left to the personal judgment and tests of the wife". (R. 28.) It therefore cannot logically be compared to the language in Merchants National Bank of Boston v. Commissioner,

320 U.S. 256 (1943), compelling a preference for the life beneficiary's desires over the interests of the remaindermen.

Accordingly, it is clear that the language of the Lockwood will when read as a whole, defines an objective standard controlling the trustee's power to invade principal, namely Mrs. Lockwood's accustomed standard of living. As stated by the District Court, "This is, on close examination, the ordinary case of a husband seeking to insure his wife's continued enjoyment of a settled way of life". (R. 28-29.) "Indeed, it is patent that in the ordinary case this is all that a testator really wants and all that the beneficiary needs". Hartford-Connecticut Trust Co. v. Eaton, 36 F. 2d 710, 711 (2 Cir. 1929)

The government, in its brief, argues that the trustee's power to invade corpus for the "happiness" of the widow during her life and its power to pay amounts to her "for whatever she may desire" is too broad to present an ascertainable standard. (Government Brief 7) This argument fails to recognize the limitations placed on the word "happiness" within the basic grant of power and by the sentence immediately following it, and attributes to the phrase "for whatever she may desire" an invitation to extravagance which is clearly unwarranted. The

government, in an attempt to defeat the testator's charitable expectations, takes his language out of context, thereby failing to discern his intent from the will read as a whole.

This approach has been rejected by this court in a series of cases dealing with this subject matter. In Lincoln Rochester Trust Co. v. McGowan, 217 F. 2d 287 (C.A. 2 1954) invasion of the principal was permitted "to meet any unusual demands, emergencies, requirements or expenses for her personal needs that may arise from time to time." The will additionally stated that this clause was "intended to provide for emergencies arising from sickness, accident or failure of investments". This Court held that the broad discretionary power of the trustee did not prevent a charitable deduction because of the additional presence of qualifying language which established an objective standard to guide the trustees in the exercise of their power.

In Salisbury v. United States, 377 F. 2d 700 (C.A. 2 1967) the trustee was empowered to invade corpus for the "support, care and benefit" of the income beneficiary during incapacitation because of illness, age or other cause. The government, relying on the decisions of the Supreme Court in Merchants and

Union Planters argued that the word "benefit" was too broad to provide the required ascertainable standard. This Court, rejected this argument, stating:

"This being so, the Government urges us to focus on the word "benefit", which, in a different context, has been held to provide no presently ascertainable standard, see Newton Trust Co. v. CIR, supra, and to totally disregard the preceding words, which concededly provide such a standard, cf. Lincoln Rochester Trust Co. v. CIR, supra. However, it is elementary that the key words of an instrument must be interpreted in light of their context, 4 Mertens, op. cit. supra sec. 28.38, p. 407. The decisions of the Supreme Court in Merchants National Bank, supra, and Henslee v. Union Planters National Bank & Trust Co., supra, upon which the Government heavily relies, did not rest exclusively upon the subjective implications of "happiness" when preceded by "comfort, support, maintenance \*\*\*" in the former, or on those of "pleasure" preceding "comfort and welfare" in the latter. See Merchants, supra, 320 U.S. at 263, 64 S.Ct. 108, 88 L.Ed. 35; Union Planters, supra, 335 U.S. at 598, 69 S.Ct. 290, 93 L.Ed. 2d 259. Rather the Court was at least equally influenced by the presence of additional instructions which directed the trustee to ignore his otherwise primary duty to protect the interests of the remainderman as well as those of the life beneficiary, see Blodget v. Delaney, supra, 201 F. 2d at 593-594, in favor of the life beneficiary's "happiness" or "desires". See Lincoln Rochester Trust Co. v. CIR, supra, 181 F. 2d at 425; Blodget v. Delaney, supra, at 592, and especially see United States v. Powell, supra, at 827-828, distinguishing Merchants and Union Planters solely on the ground of the additional instructions present therein." Salisbury v. United States, supra, at 706.

This Court, finding that the word "benefit" was not standing alone or accompanied by expansive modifying language or permissive instructions, held that the trustee's power of invasion was limited by the qualifying station in life standard.

The government seeks to avoid the analytical approach taken by this Court in the aforementioned cases, by urging this Court to adopt the approach utilized in United States v. Commercial National Bank of Kansas City, 404 F. 2d 927, 931 (C.A. 10, 1968). In that case the estate tax deduction was disallowed for a charitable remainder where the trustee was given the power to invade principal for the "comfort, welfare, contentment and happiness" of the life tenant, and was additionally instructed that the life tenant's "enjoyment of the benefits of the said trust should be considered as paramount". The trust instrument also contained language referring to the maintenance of the life tenant's accustomed standard of living. The approach adopted by the Court was that where an instrument contains both a broad and a narrow standard of invasion, the instrument must be treated as permitting invasion to the extent of the broader standard.

This approach is contrary to the approach of this Court, which is simply to analyse the language of the instrument as a whole in order to determine the presence or absence of an objective standard. This approach was maintained in the recent case of Hartford National Bank and Trust Co. v. United States, 467 F. 2d 782 (1972), wherein this Court held that the arguably subjective word "welfare" was adequately modified by the adjective "physical" so as to provide the necessary objective standard. This Court's approach is also consistent with the injunction of the Connecticut Supreme Court requiring that the intent of the testator is "to be determined from reading the instrument as a whole". Conner v. Hart, supra, p. 275.

The government's attempt to undermine the decision of the District Court by distinguishing the cases of United States v. Powell and Estate of Ford is also without merit. The apparent distinction offered by the government is that these cases arise under Sections 2036 and 2038 of the Code which deal with transfers subject to reserve powers, rather than Section 2055. This is a classic case of a distinction with a difference, since the approach taken by the courts is the

same under each of these sections, the cases cited are the same, and the result is the same, namely, the determination of the presence or absence of an ascertainable standard, with the effect of either realizing the testator's charitable expectations or enhancing the government's coffers. See 4 Mertens, Federal Gift and Estate Taxation, Charitable Transfers, Sec. 28.37, fn. 93, at 397; United States v. Powell, supra, at 826-828; Estate of Ford v. Commissioner, supra.

The government's interpretation of the application of Connecticut law is also erroneous. The government places heavy emphasis on Connecticut Bank & Trust Co. v. Lyman, supra, for the proposition that the Connecticut courts would enforce an unlimited power of invasion by the trustee. Although this proposition does find support in that case, it should be noted that the court expressed an even stronger view of enforcing limitations imposed by the trustee: "And even though an extremely liberal power of invasion of principal is given to, or for the benefit of, an income beneficiary, if any purposes of, standards for, or limitations on, the exercises of that power are expressed, we have required their enforcement and

have refused to permit an untrammelled invasion of principal where discretion was involved". Connecticut Bank & Trust Co. v. Lyman, supra, p. 278. Since the instant case clearly involves limitations on the trustee's invasion power, the Connecticut courts, under the Lyman rule, would enforce these limitations and the standard set forth in the will.

In addition to Lyman, the Connecticut cases which have dealt with the rights of life beneficiaries of trusts to invade principal to the possible detriment of remainder interest have evinced a consistent policy to limit such rights and thereby preserve the estate for the benefit of the remaindermen, in the absence of clear and unequivocal language in the governing instrument showing that such limitations are not applicable. This principal is demonstrated in the following quote from Hooker v. Goodwin, supra, p. 467-468:

"Concerning the provision of a will, "Should it be necessary for their personal comfort to use any portion of said property," etc., we said: "The right to resort to the principal was founded on necessity and restricted by necessity," and meant, "as in the case of the obligation of a husband to furnish necessities for his wife." Peckham v. Lego, 57 Conn. 553-556, 19 Atl. 392. In Hall v. Culver, 34 Conn. 403, 405, where a wife gave her husband a power of disposal "if he should want for his support to sell any part or the whole for his

maintenance," we held that "the sale is to be proportioned to the extent of the necessity." In Little v. Geer, 69 Conn. 411, 415, 37 Atl. 1056, the codicil gave to a wife "the privilege of using as much of the principal as she may desire for her comfort and maintenance," and the will gave the executors power to sell the estate and use the avails for the proper and comfortable maintenance and support of the wife in case the income "be insufficient for her comfortable and proper maintenance". We held that "the widow is confined to what she may require 'for her comfortable and proper maintenance and support.'" In Russell v. Hartley, 83 Conn. 655, 78 Atl. 320, the will provided: "And if in the judgment of said trustee she shall need more than the income thereof, then I authorize my said trustee to pay over to her from time to time such portion of the principal of said trust as he may deem necessary for her comfortable support." We held that the trustee's "authority to pay over the principal is limited by the purpose named, viz: 'for her comfortable support.'" We further held that the widow might in her discretion appropriate so much of the income as was "reasonable for her support as stated in the will." And we had previously determined that reasonable support under those circumstances meant a maintenance in a manner suitable to her station and condition of life under the circumstances and situation presented in each case."

See also Hartford - Connecticut Trust Co., v. Eaton, supra, at 711.

The government also imports a greater significance to the phrase "in its absolute and unhampered discretion" than the Connecticut courts recognize. The Connecticut Supreme

Court in Conner v. Hart, supra, stated that although the use of the term "sole discretion" confers a wide discretion, no language in a trust will be so construed as to remove a trustee from equitable control. The court also stated that this rule is applicable even when the will has used the term "absolute discretion" and that the rule applies with perhaps even more rigor when a charitable trust is involved. See Ministers Benefit Board vs. Meriden Trust Co., 139 Conn. 435, 448, 94 A.2d 917 (1953). Accordingly, the trustee's discretion in the instant case is clearly subject to the equitable control of the state courts.

The government also argues that Connecticut law supports its argument that there is no maximum restriction upon invasion of principal for the purely subjective purposes of the widow over and above the maintenance of her normal mode of life. Finding that the court in Hooker v. Goodwin, supra, equated the term "necessary" with the life tenant's "station in life," the government reasons that "the necessary expenses" of Mrs. Lockwood are accordingly equivalent to the expenses she would incur in maintaining her accustomed station in life. (Government Brief 23.). Accordingly, any invasion standard providing for more than the necessary expenses, presumably the Five Hundred Dollars (\$500.00)

monthly payment, brings in the element of uncertainty proscribed by the Regulations. (Government Brief 23.).

As noted by the District Court, the flaw in this argument is that the government fails to recognize that the testator clearly divided the wife's accustomed standard of living into three main components - occupying "her own home," her "necessary expenses" and her "personal spending money". Together these components comprise her accustomed standard of living. As stated in Hooker v. Goodwin, the term "necessary" is a variable one which is restricted or enlarged by the surrounding circumstances. It is clear from the testator's language that the monthly payment is above and beyond her necessary expenses and is required in order to keep the wife living in the manner in which she was accustomed. As stated previously, the monthly payment is merely an approximation of her disposable income and the figure of Five Hundred Dollars (\$500.00) was used by the testator in order to guide the trustee in his discretion. The standard is still her accustomed style of living whether she requires Five Hundred Dollars or Seven Hundred Dollars per month. The testator simply wanted his wife to have enough money to underwrite and maintain her normal life style - and no more.

Accordingly, the government's conclusion that the "Magistrate's opinion" is erroneous and represents a clear departure from the controlling principles of law, is completely unsupported and without merit. The decision is well-reasoned and indicates a clear understanding of the applicable federal and state law. The government's transparent attempt to undercut the decision because it was written by a Magistrate dishonors both the Magistrate and the District Court, which reviewed and approved the decision, and is completely irrelevant to the issue at hand.

#### CONCLUSION

This is an ordinary case of a husband's seeking to insure his wife's continued enjoyment of an accustomed manner of life during her lifetime, and to provide for his favorite charities thereafter. Although the testator used the word "happiness", it does not stand alone nor is it accompanied by expansive modifying language or permissive instructions. In fact, the testator provided additional language to define and limit the trustee's power of invasion in a manner as easily or more readily determined than in the Salisbury, Estate of Ford, or Powell cases. Moreover, it is clear that the Connecticut courts would enforce

this limitation in order to protect the interests of the remaindermen.

Since the language of the testator's will, read as a whole, provides an objective standard limiting invasion of principal to the maintenance of the widow's accustomed standard of life, and since the possibility of invasion is so remote as to be negligible, the District Court's decision that the charitable remainder interest is "presently ascertainable," within the meaning of the Regulations, and hence deductible under Section 2055, is proper and should be affirmed.

Respectfully submitted,

A handwritten signature in cursive script, reading "Louis Ciccarello". The signature is written in dark ink and is positioned above a horizontal line.

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Louis Ciccarello,  
Lovejoy, Cuneo and Curtis,  
168 East Avenue,  
Norwalk, Connecticut 06851  
Appellee's Attorney

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on the 28th day of March, 1974, in an envelope with postage prepaid, addressed as follows:

Scott P. Crampton,  
Assistant Attorney General,  
Tax Division,  
Department of Justice,  
Washington, D.C. 20530

  
\_\_\_\_\_  
LOUIS CICCARELLO,  
Attorney